Petition

81-1435

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NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

WILLIAM COLACURCIO, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Application for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE ISSUES

1. Whether the evidence adduced, showing only the involvement of five persons during some portion of a substantially continuous 30-day period, was sufficient to establish a violation of 18 U.S.C. §1955(b)(1), i.e., whether the evidence must show, and whether it did in fact show, the participation by at least five persons, not necessarily the same persons, during all or most of the jurisdictional 30-day period?

2. If the proof of the §1955(b)(1) offense was inadequate for failure to prove the requisite 5-person element, then whether the Government proved the requisite "pattern of racketeering activity" when, under the law of the State of Louisiana, an agreement to make a series of bribery payments followed by the making of several payments consistently with that

agreement constitutes but a single bribery offense?

3. Whether a Hobbs Act-type extortion may constitute a defense to bribery under the RICO Act, 18 U.S.C. §1961 et seq., since such an extortion would deprive the victim/defendant of his volition to resist.

LIST OF INTERESTED PARTIES

Pursuant to Rule 21.1(b) of the Rules of this Honorable Court, petitioner states that the following listed parties were parties in the proceedings below:

Dinos Rallis

Theodoros G. DiMopoulas

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PETITION FOR A WRIT OF CERTIORARI

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

The petitioner, William Colacurcio, Jr., respectfully prays that a writ of certiorari issue to review the judgment and

opinion of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on October 22, 1981.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, post, p. A-1 et seq.) is unofficially reported at 659 F.2d 684.

There was no formal opinion accompanying the order denying the petition for rehearing. A copy of the Order denying rehearing is reproduced herein in Appendix C, post, p. A-27.

There were no relevant written opinions of the District Court.

The Court below granted a stay of the issuance of the mandate pending a timely filing of this petition for a writ of certiorari on or before February 1, 1982, and the notification of the Clerk of the said Court, by a certificate of the Clerk of this Honorable Court, that same had been

filed within the allotted time, said stay then to remain in effect pending the consideration and disposition of this application. See Appendix "D," post, p. A-29.

JURISDICTION

The judgment of the Court of Appeals (Appendix B, post, p. A-25) was entered on October 22, 1981. It became final upon the denial by the Court below of a timely filed petition for rehearing on December 3, 1981.

This case originated in the United States District Court for the Eastern District of Louisiana upon an indictment charging petitioner with conducting a gambling business in violation the law of the State of Louisiana, engaging in a pattern of racketeering activities and conspiring to do so, violations of 18 U.S.C. §§1955, 1962(c) and 1962(d), respectively. The

District Court had jurisdiction of this case pursuant to 18 U.S.C. §3231.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States in pertinent part provides:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

The statutes describing the offenses with which the petitioner is charged, 18 U.S.C. §§1955 and 1962(c, d), read in pertinent part as follows:

18 U.S.C. §1955, in relevant part, provides:

> (a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.
>
> (b) As used in this section--

(1) "illegal gambling business" means a gambling business which--

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

18 U.S.C. §1961, in pertinent part, provides:

(1) "Racketeering activity" means (A) any act or threat involving * * * bribery * * * which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under

any of the following provisions of title 18, United States Code: * * * section 1955 (relating to the prohibition of illegal gambling businesses) * * *.

* * * * * *

(5) "Pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.

18 U.S.C. §§1962(c) and 1962(d) provide:

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

STATEMENT OF THE CASE

A. Procedural Summary.

On June 6, 1979, petitioner and two others were indicted by a grand jury within the Eastern District of Louisiana and charged with violations of 18 U.S.C. §§ 1955, 1962(c) and 1962(d).

Petitioner pleaded not guilty to each of the three charges.

Petitioner filed a pre-trial motion to strike the indictment references to certain card games mentioned in the gambling count brought under 18 U.S.C. §1955(a) because, under the definition of "gambling" contained within 18 U.S.C. §1955(b)(2), no card games, e.g., poker, blackjack or any other well-known or even obscure card games, were enumerated therein and, under the doctrine of ejusdem generis, the language, "include, but not to be limited to," must be construed to require the un-

enumerated forms of gambling to be of like kind to those actually enumerated. The district court denied that motion and the Court of Appeals affirmed its ruling.

Petitioner also filed a motion to dismiss the charges brought under the R.I.C.O. Act, 18 U.S.C. §1961 et seq., because the indictment failed to state an offense within the purview of that Act. Relying on United States v. Sutton, 605 F.2d 260 (6 Cir. 1979), and United States v. Anderson, 626 F.2d 1358 (8 Cir. 1980), petitioner urged that a RICO violation occurs only when a pattern of racketeering activities is used to take over and/or conduct the affairs of a legitimate business enterprise, not when the enterprise consists solely of the pattern of racketeering activities--a common multiobjective conspiracy. Pending the appeal of this case, the First Circuit, in United States

v. Turkette, 632 F.2d 896 (1 Cir. 1980), applied the minority view of Sutton and Anderson, rather than the majority view reflected by the Fifth Circuit's opinion in United States v. Elliott, 571 F.2d 880 (5 Cir.), cert. denied, 439 U.S. 953 (1978), which held that the "pattern of racketeering activity" could constitute an "enterprise" within the RICO Act's scope. The Court of Appeals, in disposing of petitioner's motion to dismiss, stated (659 F.2d at 687):

> * * * appellants base their argument on United States v. Turkette, [supra], in which the First Circuit reached the opposite conclusion from that reached by us in Elliott. The Supreme Court has resolved the variance by reversing United States v. Turkette, ___ U.S. ____, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981), and deciding the question in a manner consistent with out Elliott decision.

At the conclusion of the Government's presentation of its evidence-in-chief, petitioner moved for a judgment of acquittal

on the ground the Government had failed to prove the existence of a five-person gambling operation involving five or more persons for a substantially continuous 30-day period as required by 18 U.S.C. §1955 and on the grounds the RICO Act charges were not proven because (a) there had been no proof of the invasion or operation of any legitimate business enterprise through a "pattern of racketeering activities" and (b) there had been a failure to prove a "pattern" of racketeering activities since the Government had failed to prove one alleged predicate offense, 18 U.S.C. §1955, and, under State law, a bribery scheme involving a sequence of payments constituted but a single gambling offense. The Government thus failed to prove at least two predicate offenses necessary to constitute a "pattern" of racketeering activities. The Trial Court denied that motion and, when

the motion for a judgment of acquittal was renewed at the conclusion of the trial, the Trial Court again denied it. The Court of Appeals affirmed those rulings. 659 F.2d at 687-689.

Consistently with evidence adduced at the trial by the defense to show that the defendant had been compelled in much the same way as any other victim of a Hobbs Act extortion to pay off the police officers with whom this case was involved, the defense sought the following jury instruction:

> Coercion or compulsion may provide a legal excuse for the crimes charged in the indictment. In order, however, to provide a legal excuse for any criminal conduct, the compulsion must be present and immediate and of such a nature as to induce a well-substantial economic loss or illegal deprivation of liberty or property without a reasonable hope or expectation that the authorities will act to prevent such feared consequences from being realized. There must be no reasonable opportunity to escape the compulsion without committing the crime,

or participating in the commission of the crime.

> If the evidence in the case should leave you with a reasonable doubt whether, at the time of the alleged offenses, the accused acted, or failed to act, willfully and voluntarily, that is to say, whether the accused was forced in effect to commit or aid in the commission of the crime charged in the indictment, as just explained, then you should acquit the accused.

The Trial Court refused to give that instruction to the jury. The Court below affirmed that action of the trial court, stating (659 F.2d at 690):

> Appellants contend that the trial court erred in refusing to instruct the jury on the defense of duress. Appellants reason that they were coerced by the police into offering bribes and that such economic coercion--sufficient to establish a case under the Hobbs Act, 18 U.S.C. §1951 --is a complete defense to the bribery charge.
>
> This argument is unconvincing for three reasons. First, the Supreme Court held in United States v. Bailey, 444 U.S. 394 (1980), that the duress defense is not available "if there was a reasonable, legal alternative to violating the law, 'a chance both to refuse to do the criminal act

and also to avoid the threatened harm.'" Id. at 410 (citing W. LaFave & A. Scott, Handbook on Criminal Law 379 (1972)). In the present case there were legal alternatives available: the matter could have been reported to the Internal Affairs Division of the New Orleans Police Department5/, to the District Attorney, or to the United States attorney. Since appellants failed to pursue available reasonable alternatives, they may not successfully raise the duress defense6/.

Further, appellants' insistence that extortion can be a defense to bribery is incorrect. See United States v. McPartlin, 595 F.2d 1321 (7 Cir.), cert. denied, 444 U.S. 833 (1979). Therefore, even if the appellants were subjected to extortion, they can still be convicted on the bribery charge.

Finally, the record clearly demonstrates that the payoffs were not keyed to the termination of the alleged police harassment, but were solely to protect the gambling operation. The suggestion that appellants should not be convicted of bribery because they were forced by the police to make the payments in order to continue their illegal gambling business is devoid of merit. We find no error in the trial judge's refusal to instruct the jury on duress.

B. Summary of Evidence Relevant to this Petition for Certiorari

Of the three issues presented for review by this Honorable Court, only one of them requires any significant discussion of the facts of this case. The other two issues are purely legal questions, the only factual aspects being the question of the applicability of the issue of law to the facts of the instant case.

The Court of Appeals, viewing the evidence in the light most favorable to the Government as this Court has held that it should do, summarized the evidence relative to the five-person element of the §1955 charge as follows:

> The casino began operation with a card game during the early morning hours of January 20, 1979. The officers were present. Rallis collected money for the chips; DiMopoulas distributed them. Rallis took three percent of the chips from each pot and placed them in a cigar box; DiMopoulas periodically emptied this cigar box into a drawer. Two other persons, Demetra Ann Pierce and Vassi-

lios Metrakos, served sandwiches and drinks to the players. Pierce and Metrakos also acted as security guards by looking through a peephole in the casino's door and observing people exiting the elevator. If they were recognized, Pierce or Metrakos would admit them to the casino.

The officers returned to the casino that evening and found the operations essentially unchanged. Pierce and Metrakos waited on the patrons, including the officers, and cleaned up the premises. A week later, one of the officers returned and observed a dice game and a card game; Rallis, DiMopoulas, Pierce, and Metrakos were performing the same roles as before.

After the first ten days of operation, Colacurcio expressed satisfaction with the officers' services and paid them $300. During the months of February, March, and April, Colacurcio paid the officers $300 in cash each week. Colacurcio insisted that all payments be made by him to the same officer so that if a "problem" developed the matter would involve one man's word against another.

On March 3, 1979, the officers observed a card game similar to those previously observed. During the game Rallis gave DiMopoulas fifty dollars. DiMopoulas motioned one of the officers to the side, surreptitiously passed the $50 to him through a handshake, winked, and said "That's from Dinos."

> In late March, the officers met Rallis at the casino and were introduced to a man named Al who was to run a dice game on the third floor. Rallis told the officers that he and Colacurcio would take a percentage of Al's profits and that Colacurcio would pay for protection of that operation as well. Several days later the officers observed this dice game.

The Court of Appeals found that the three indicted defendants, Metrakos and Pierce were involved during the period the police observed the games during January. The Court of Appeals found that the evidence was sufficient to show that the gambling operation lasted from January to March and that, because of the payoffs made during those three months, the evidence was sufficient to show that the operation was substantially continuous. The "similar" operation in March, however, does not mention Metrakos or Pierce, hence there was not sufficient evidence to show that those persons were involved after the

last observations of the police in January. The gambling on a separate floor of the casino in March lasted only one night. It was not alleged that the total take of the casino (both floors) was in excess of $2,000--the jurisdictional amount under 18 U.S.C. §1955--and the proof failed to show that the operation, including A1, was in substantially continuous operation with five or more persons involved for the thirty day period in which that person was a participant. The Court of Appeal held that evidence to be sufficient to meet the test of §1955 and denied a timely petition for rehearing in which petitioner showed that the evidence was insufficient to prove a §1955 offense as alleged in the indictment.

The evidence showed that there were meetings between petitioner, Rallis and the police officers and that, over a

course of time, a plan evolved that the officers would take periodic payments for protection of petitioner's business interests, principally gambling but also with regard to his Bourbon Street night clubs. This was a single agreement to make a series of payments which, under the law of the State of Louisiana, constitutes but a single bribery.

REASONS FOR ALLOWING THE WRIT

I.

The Court Below has decided an important question of Federal law in a manner in apparent conflict with the statute being interpreted, which interpretation has never been, but should be, settled by this Honorable Court.

18 U.S.C. §1955, in relevant part, provides:

> (a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.
>
> (b) As used in this section--
>
> (1) "illegal gambling business" means a gambling business which--
>
> (i) is a violation of the law of a State or political subdivision in which it is conducted;
>
> (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and
>
> (iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) If five or more persons conduct, finance, manage, supervise, direct, or own all or part of a gambling business and such business operates for two or more successive days, then, for the purpose of obtaining warrants for arrests, interceptions, and other searches and seizures, probable cause that the business receives gross revenue in excess of $2,000 in any single day shall be deemed to have been established.

In the instant case, there is no issue that the gambling operation with which this case is involved violated the laws of the State of Louisiana. It is the second and third elements of §1955(b)(1), i.e., involves five or more persons and remains in "substantially continuous oper-

ation for a period in excess of thirty days," that we believe the Court below misinterpreted when it analyzed the evidence in this case and held it to be sufficient to establish a violation of 18 U.S.C. §1955.

Congress required the coalescence of three specific elements before the crime denounced in §1955 occurs. That is evident from the use of the word "and" between the second and third subsections of §1955(b)(1). The interpretation put on the statute by the Fifth Circuit, if correct, changes the law from one dealing with gambling operations of a specific size which either operates for a substantially continuous period or which takes in revenue of a specific amount to one which, over a period of time, involves the minimal jurisdictional number of persons. That is not what Congress intended when it

required the involvement of five or more persons. Congress intended that the five or more persons be involved either for the jurisdictional time period or on a night when the revenue of the gambling operation met the minimal jurisdictional amount.

Under the interpretation put on the statute by the Fifth Circuit, it is conceivable that a person could conduct a gambling operation for most of a thirty-day period, taking on one assistant on four of those nights, and be prosecuted under the provisions of §1955. Such an interpretation completely defies logic and the obvious intent of Congress. The five-or-more persons element must be superimposed upon the 30-day or $2,000 element in order to comply with the statute.

As the analysis of the evidence by the Fifth Circuit demonstrates, there was no proof that during any thirty-day period

there were five or more persons involved for all or most of it. As previously noted, the defendants were not charged with having a revenue of $2,000 or more in any single day, hence could not be convicted of that even if the evidence did show that--which it did not.

The interpretation put on §1955 by the Fifth Circuit in order to determine that the defendants violated that statute is unjust, incorrect and should be reversed before it gathers any headway in the prosecution of local gambling offenses under §1955.

The instant case is unlike United States v. Marrifield, 515 F.2d 877 (5 Cir.), cert. denied, 423 U.S. 1021 (1975), in which the Court below recognized that the evidence, to be sufficient, must show that five or more persons participated in whole or in part during more

than a 30-day period when the gambling business was in substantially continuous operation. In that case, only four persons were shown to have participated in any given night, but six persons were shown to have been regularly involved over a 30-day period. That case involved a relief man who regularly acted in the place of other participants when they were absent. In the instant case, there was no such showing. There was only the showing that five persons were involved during part of a 30-day period. That does not meet the requirement of the law.

This case also differs from United States v. Allen, 588 F.2d 1100 (5 Cir.), cert. denied, 441 U.S. 965 (1979), because the Court in that case found the involvement of five or more persons during a continuous 30-day period. To reiterate,

no such showing was made in the instant case.

The Marrifield case correctly acknowledges that it is necessary that the five-man/30-day test must be first shown to have existed before a "gambling business" within the meaning of 18 U.S.C. §1955 exists. After that, any person who joins it may be counted as a participant. But even then, Marrifield holds that such persons are not "automatically subject to conviction without regard to size, continuity or time span simply because size and continuity requirements were originally met." This principle should have governed the determination of the Court below. There was no showing that there was ever five persons for a major portion of a 30-day period; no rotation of personnel so that five or more persons either participated at one time or stood by awaiting

duty in the casino; or any other means of properly counting persons to satisfy the five-person/30-day jurisdictional element.

For the foregoing reasons, the judgment of the Court below affirming the judgment of conviction on the §1955 charges was erroneous. It extends the statute beyond the intent of Congress and portends further such extension if not corrected by this Honorable Court. This Court has complained that Federal prosecutions are bogging down the Federal judicial system and preventing justice from being done on the civil side of the Court. If the interpretation made by the Fifth Circuit of 18 U.S.C. §1955 is permitted to stand, the Federal judiciary will be sitting in judgment of every petty gambler who can be shown to have ever acted with five or more persons, regardless of the size of the gambling operations with which he was in-

volved. Congress did not intend such a result. It would be inappropriate and inconsistent for this Court to so expand federal jurisdiction to permit prosecutions of gambling enterprises of the size shown here to have existed.

II.

The Fifth Circuit has decided a question of State law in conflict with applicable decisions of the Louisiana Supreme Court, which decision, if the petitioner is correct in its argument on Point I, supra, that a §1955 offense was not proven, was made an improper basis for determining the existence of the requisite number of predicate offenses to constitute a violation of the RICO Act.

In the absence of proof of the five-person element of the §1955(b)(1) offense alleged in the indictment it is necessary that there have been proof of at least two bribery offenses in order to establish the "pattern of racketeering activity" necessary to sustain the RICO charges. The Court below cited two federal cases and

State v. Ponthier, 391 So.2d 1138 (La. 1980), for the proposition that each bribery payment constituted a separate offense. Significantly, 18 U.S.C. §1961(1)(A), defining "racketeering activity", relates to offenses, including bribery, which are "chargeable under State law." Thus, the State law definition of bribery controls. The Court below stated that the rationale of _State v. Ponthier_ "supports a finding of multiple offenses in the case at bar." Slip op., p. 12534 n. 4. Ponthier involved two separate bribes to a State Trooper to fix two separate criminal cases. The bribe offers were separately made: "Ponthier knew Biossat and offered him $500 to get a DWI charge dropped (Count I) and an additional $200 for a simple battery charge scheduled to be tried later that morning (Count II)." 391 So.2d at 1139. That

case did not involve an agreement to make multiple payments to accomplish a general continuing bribery scheme. In fact, where multiple payments were made to accomplish the same goal, the Louisiana Supreme Court found that the counts of the indictment charging each such payment as a separate offense was multiplicitous. It required that those counts of the indictment be quashed. 391 So.2d at 1139. The Ponthier case squarely supports the petitioner's position that a general bribery protection scheme in which a series of payments is offered and the acceptance thereof is agreed upon constitute but a single bribery offense. Ponthier's mistake was to separately offer the $500 and $200 bribes. Had he offered the officer $700 to fix both cases, payable in regular installments, there would have been but one bribery under State law. There was thus

only one bribery under State law in this case. Since there was a failure to prove the five-person element of the §1955(b)(1) offense, there were not two predicate offenses which the RICO statute requires for conviction.

Petitioner was entitled to the entry of a judgment of acquittal on the RICO Act charges of committing a pattern of racketeering activities and conspiring to do so because of the failure of proof of the requisite two or more predicate offenses. The interpretation of State law made by the Fifth Circuit in contradiction of the interpretation made by the Louisiana Supreme Court was without authority and improper. The RICO Act requires the federal authorities to take State law as it finds it and to work within the framework of the State's constructions of its own laws. The federal authorities cannot find a pos-

sibly applicable State law and interpret it to suit their needs to meet the requirements for a prosecution under RICO when the RICO Act depends upon violations of State law in the relevant context here.

It was prejudicial error for the Court below to have misinterpreted and misapplied the law of the State of Louisiana in order to find the existence of two predicate offenses in order to save the convictions of petitioner under the RICO Act. This Court should reverse the judgment below and compel future federal appellate courts to rely upon applicable interpretations of the States' highest courts when interpreting the law of a State. This Court has frequently found itself so bound. It would not place a substantial burden upon the lower federal appellate courts to do so.

III.

The Court below misapplied the law when it held that a Hobbs Act type of extortion cannot constitute a defense to a charge of bribery.

In reaching the conclusion that extortion is not a defense to bribery, the Court below overlooked the clear language of United States v. Duhon, 565 F.2d 345, 351 (5 Cir.), cert. denied, 435 U.S. 952 (1978), that bribery does not constitute extortion or violate the Hobbs Act. See, also, United States v. Hyde, 448 F.2d 815, 833 (5 Cir. 1971), cert. denied, 404 U.S. 1058 (1972). In Hyde, the Fifth Circuit pointed out that one of the distinctions between bribery and extortion is that in the latter there is a "lack of voluntariness on the part of the victim"--in this case petitioner Colacurcio. Depriving one of volition to choose whether or not to participate in a

police payoff scheme constitutes extortion. United States v. Braasch, 505 F.2d 139 (7 Cir. 1974), cert. denied, 421 U.S. 910 (1975). The deprivation of volition negates the element of voluntariness which distinguishes extortion from bribery. Clearly, there was a failure to prove bribery at all. The deprivation of volition under color of official right subjected petitioner to duress and jury charges on that theory of defense should have been granted.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, F. Irvin Dymond, Attorney of Record for the Petitioner and a Member of the Bar of the United States Supreme Court, certify that I have served by United States Mail three copies of the foregoing Petition for a Writ of Certiorari upon the Solicitor General of the United States, first class postage prepaid, by addressing an envelope containing same to him at his official address and posting same at the United States Post Office, Main Branch, Loyola Avenue, New Orleans, Louisiana, this ____ day of January, 1982.

All parties required to be served have been served.

F. IRVIN DYMOND
Attorney at Law

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

William COLACURCIO, Jr., a/k/a Rick Colacurcio, Dinos Rallis, a/k/a Kanavaros Panayotis, and Theodoros G. DiMopoulas, a/k/a Teddy,
Defendants-Appellants.

No. 80-3063

United States Court of Appeals
Fifth Circuit.*
Unit A

Oct. 22, 1981.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before THORNSBERRY, REAVLEY and POLITZ, Circuit Judges.

POLITZ, Circuit Judge:

Appellants William Colacurcio, Jr., Dinos Rallis, and Theodoros G. DiMopoulas were involved in a gambling operation in

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* Former Fifth Circuit case, Section 9(1) of Public Law 96-452--October 14, 1980.

the French Quarter in New Orleans. To avoid arrest, they bribed several police officers, all of whom were undercover agents posing as corrupt policemen. Appellants were indicted for conspiring to violate the Racketeer Influenced Corrupt Organizations Act (RICO), 18 U.S.C. §2962(d), for committing a substantive RICO violation, 18 U.S.C. §1962(c), and for conducting an illegal gambling operation in violation of 18 U.S.C. §1955. The jury returned verdicts of guilty on all counts except for DiMopoulas' conspiracy charge. Finding no merit in any assignment of error, we affirm.

Facts

In September 1978, the Federal Bureau of Investigation and New Orleans Police Department jointly undertook an investigation of criminal activities in the French Quarter. Three New Orleans policemen and

one FBI agent, posing as corrupt police officers, made themselves available for "payoffs." Using this cover, they penetrated appellants' illegal gambling enterprise. The material highlights of the evidence introduced at trial, which consisted largely of the testimony of the undercover officers and tape-recorded conversations between the officers and defendants, reflect the following scenario.

On December 27, 1978, the undercover officers met with Colacurcio's son, Billy, who suggested the possibility of payoffs for "protection." A week later the officers met with Colacurcio and Billy and discussed a "package" deal, which included protection for proposed illegal gambling and prostitution operations, and other services such as help inside the prosecutor's office in the event of an unfortuitous arrest. On January 4, 1979, the officers

again met with Colacurcio and were introduced to rallis, who was to operate the gambling. Rallis was aware of the protection negotiations. A few days later the officers, Colacurcio and Rallis examined a site on Iberville Street for the proposed gambling casino. Rallis signed a lease on the Iberville Street property, and the second floor was renovated and equipped for gambling. At other meetings during this time, Colacurcio, Rallis and the officers discussed, among other things, the prospects of the gambling venture, Rallis' qualifications to run the casino, the obligations of the officers under the arrangement, and the compensation the officers would receive for their efforts.1/

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1. The officers were informed that they had a state in the successful operation of the casino because their protection payoffs would increase as business improved.

The casino began operation with a card game during the early morning hours of January 20, 1979. The officers were present. Rallis collected money for the chips; DiMopoulas distributed them. Rallis took three percent of the chips from each pot and placed them in a cigar box; DiMopoulas periodically emptied this cigar box into a drawer. Two other persons, Demetra Ann Pierce and Vassilios Metrakos, served sandwiches and drinks to the players. Pierce and Metrakos also acted as security guards by looking through a peephole in the casino's door and observing people exiting the elevator. If they were recognized, Pierce or Metrakos would admit them to the casino.

The officers returned to the casino that evening and found the operations essentially unchanged. Pierce and Metrakos

waited on the patrons, including the officers, and cleaned up the premises. A week later, one of the officers returned and observed a dice game and a card game; Rallis, DiMopoulas, Pierce, and Metrakos were performing the same roles as before.

After the first ten days of operation, Colacurcio expressed satisfaction with the officers' services and paid them $300. During the months of February, March, and April, Colacurcio paid the officers $300 in cash each week. Colacurcio insisted that all payments be made by him to the same officer so that if a "problem" developed the matter would involve one man's word against another.

On March 3, 1979, the officers observed a card game similar to those previously observed. During the game Rallis gave DiMopoulas fifty dollars. DiMopoulas motioned one of the officers to the side,

surreptitiously passed the $50 to him through a handshake, winked, and said "That's from Dinos."

In late March, the officers met Rallis at the casino and were introduced to a man named Al who was to run a dice game on the third floor. Rallis told the officers that he and Colacurcio would take a percentage of Al's profits and that Colacurcio would pay for protection of that operation as well. Several days later the officers observed this dice game.

Assignments of Error

Appellants raise a number of issues, contending: (1) we should reconsider our decision in United States v. Elliott, 571 F.2df 880 (5 Cir.), cert. denied, 439 U.S. 953 (1978); (2) the evidence is insufficient to sustain their convictions; (3) the trial judge erred in refusing to conduct individual voir dire examination

of the jurors; and (4) the trial judge erred in refusing to instruct the jury on the defense of duress.2/

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2. Appellants also raise assorted objections to several of the trial court's evidentiary rulings. Colacurcio argues that it was error for the trial court to admit a tape-recorded conversation in which he referred to a police-protected gambling establishment "we had" in Seattle. He also complains that the court erred in refusing to permit a defense witness to testify regarding hearsay statements about a pay-off scheme made to her by one of the officers. Rallis lists several instances in which he claims the trial judge erred by admitting prejudicial evidence, consisting of statements by Colacurcio that Rallis had a successful gambling operation "up north," Rallis' own statement, testified to by one of the officers, that Rallis had previously been robbed, a statement by an officer that Rallis pulled a gun on a card player in another nightclub, and a joke by DiMopoulas that Rallis had been a pimp. Rallis also contends that prejudicial error was committed when certain taperecorded material, excluded from evidence, was mistakenly included on a transcript given to the jury. In addition, Rallis complains that his right of cross-examination was impermissibly curtailed.

1. Reconsideration of Elliott

Appellants urge us to overrule our decision in United States v. Elliott, wherein we held that an association to commit illegal activities was an enterprise within the intendment of the RICO statute. This suggestion is rejected for two reasons. First, a panel of this court may not overrule a decision by a prior panel. The overruling of a previous decision is a prerogative reserved to the court sitting en banc. Second, appellants base their argument on United States v. Turkette, 632 F.2d 896 (1 Cir. 1980), in which the First Circuit reached the opposite conclusion from that reached by us in Elliott. The Supreme Court has resolved the variance by

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We find no merit in any of these allegations of error. If error was committed in any of these rulings, considering the evidence against appellant, such error was harmless beyond a reasonable doubt.

reversing United States v. Turkette, ___ U.S. ____, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981), and deciding the question in a manner consistent with our Elliott decision.

2. Sufficiency of the Evidence

Appellants contend that the government did not offer sufficient evidence to convict them of gambling and, therefore, the two predicate offenses required to sustain a RICO conviction were not established. Appellants' argument is based on two premises: (1) the government failed to demonstrate that five or more persons conducted the gambling operation, a necessary requirement of the federal gambling statute, and (2) the several instances of bribery constitute only one offense.

The Five-Person Element

A conviction under the federal gambling statute requires proof that the gam-

bling operation violates state or local law, "involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business," and "has been or remains in substantially continuous operation for a period in excess of thirty days . . . ." 18 U.S.C. §1955(b)(1). Appellants' operation commenced on January 20, 1979, and continued until at least March 3, 1979, thus satisfying the 30-day requirement. There is also no question that appellants violated state law. Appellants maintain, however, that the government failed to satisfy the five-person requirement.

They concede that the three of them may be counted towards the requirement, but argue that Pierce and Metrakos may not be. They reason that neither Pierce nor Metrakos "conducted" the gambling; they merely served food and drinks.

Additionally, appellants argue that Metrakos should not be counted because he was a patron of the casino.

Appellants' argument must yield to our recent decision in United States v. Tucker, 638 F.2d 1292 (5 Cir. 1981). In Tucker, we held that waitresses who served drinks to gamblers, made change for them, and delivered messages could be counted in the five-member tally. We reasoned that such persons participated in the "conduct" of the gambling enterprise because they performed functions necessary or helpful to its operation. This interpretation of the gambling statute is consistent with the intent of Congress "to include all those who participate in the operation of a gambling business, regardless [of] how minor the roles," United States v. Joseph, 519 F.2d 1068, 1071 (5 Cir.), cert. denied, 424 U.S. 909

(1975), and is supported by the Supreme Court's statement in Sanabria v. United States, 437 U.S. 54, 70-71 n. 26 (1968), that section 1955 "proscribes any degree of participation in an illegal gambling business, except participation as a mere bettor."

Applying this standard to the present case, and mindful that we must view the evidence in the light most favorable to the government, Glasser v. United States, 315 U.S. 60 (1942), we conclude that Pierce and Metrakos performed functions necessary or helpful to the gambling operation. Both served food and drinks to the gamblers, the same function performed by the waitresses in Tucker. They also cleaned up and acted as security guards. Both contributed to the conduct of the gambling operation at least from January 20 to March 3, 1979,3/ and, therefore, both

may be counted as part of the five-person element.

We also reject appellants' contention that Metrakos may not be counted because he gambled in the casino. We agree that a person who merely gambles may not be included in the necessary five. However, a person's participation in the conduct of a gambling enterprise is not altered by the fact that he gambles there as well. To rule otherwise would be to invite a subterfuge which would undermine the statute and frustrate the will of Congress: it would be a simple expedient to have every person, who might be counted, gamble at some

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3. As in Tucker, we do not have to decide the outer limits of the "necessary-or-helpful" doctrine. All we decide today is that the activities of Pierce and Metrakos were sufficiently related to the operations of the gambling enterprise to come within the broad scope of section 1955.

point each day. We decline the invitation to scuttle section 1955 in that manner. One who is involved in the operation of a gambling enterprise may not shield the enterprise from federal prosecution by periodically participating as a player. Persons occupying such a dual status may be counted in satisfying the numerical requirement.

Bribery

Two predicate offenses are necessary to support a RICO conviction. Colacurcio and Rallis contend that the several acts of bribery constitute only one offense. DiMopoulas argues that he did not participate in any acts of bribery so his substantive RICO conviction should be reversed.

In light of our resolution of the gambling issue, we need not consider in depth whether the bribes in this case constitute

one or multiple offenses.4/ As to Colacurcio and Rallis, the two predicate crimes were established.

DiMopoulas argues that the only evidence of his participation in a bribe was the transfer of money from Rallis to one of the officers on the third of March. DiMopoulas maintains that this is insufficient to prove his involvement in bribery. We disagree. DiMopoulas motioned for the officer to join him away from others, he used a handshake motion to transfer the money to the officer's hand, he winked,

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4. We consider each of the bribes in this case to be a separate offense. See United States v. Anderson, 509 F.2d 312 (D.C. Cir. 1974), cert. denied, 420 U.S. 991 (1975). Accord, United States v. Billingslea, 603 F.2d 515 (5 Cir. 1979) (each act of embezzlement is a separate offense); State v. Ponthier, 391 So.2d 1138 (La. 1980) (several acts found to be one offense, but rationale of decision supports a finding of multiple offenses in the case at bar).

and he said "That's from Dinos." These facts, together with DiMopoulas' knowledge of the gambling enterprise and his knowledge that the officer was one of those on the "take," are sufficient to support the conclusion that DiMopoulas participated in a bribe.

3. Voir Dire

Appellants argue that the trial judge erred by not conducting individual voir dire examination of the jurors to determine whether they had been prejudiced by pre-trial publicity. Rule 24(a) of the Federal Rules of Criminal Procedure vests the trial court with broad discretion to determine the scope and method of voir dire. This discretion includes the decision whether jurors should be questioned collectively or individually. United States v. Delval, 600 F.2d 1098 (5 Cir. 1979). In all cases, however, the court's

discretion must be exercised with due regard for a defendant's right to trial by an impartial jury. Irvin v. Dowd, 366 U.S. 717 (1961).

In United States v. Davis, 583 F.2d 190 (5 Cir. 1978), we examined the dimensions of voir dire when jurors have been exposed to potentially prejudicial pretrial publicity. We held that a trial judge had a duty to independently assess the impartiality of the jurors and outlined a three-step process for making this determination. The judge should: (1) ask what information the prospective jurors have received, (2) inquire into the prejudicial effect of the information, and (3) make an independent determination whether the information tainted the person's impartiality. Id. at 197. We also stated that individual voir dire examination out of the presence of the oth-

er members of the venire, is generally preferred but not always required. In United States v. Gerald, 624 F.2d 1291, 1298 (5 Cir. 1980), cert. denied, ___ U.S. ____, 101 S.Ct. 1369, 67 L.Ed.2d 348 (1981), we qualified our Davis ruling:

> The time-consuming, probing, preferably individual voir dire described in Davis generally is not required in cases involving unsupported general allegations of prejudicial pretrial publicity or in cases where the publicity does not create a significant potential of prejudice.

Appellants complain principally of two newspaper articles, one on May 27, 1979 and the other on June 2, 1979. The record contains excerpts from these articles. The May 27 article, which appeared on the front page of the New Orleans Times-Picayune, began: "A mystery man who law enforcement officers believe to have strong underworld connections across the United States is now operating several of

the sleaziest nude dancing joints and massage parlors on Bourbon Street." The June 2 article was entitled "Vice Kingpin Quickly Posts Bail," and the continuation of the article on page 10 was entitled "Vice Lord Posts Bail in Less Than Half An Hour." Appellants also complain, without citing specific instances, of "numerous other articles about Mr. Colacurcio which also taint him in the darkest light," and link him to some prostitution cases stemming from the same police undercover operation that resulted in appellants' arrests.

Although these instances constitute more than mere "unsupported general allegations of prejudicial pretrial publicity," we are not persuaded that this publicity created such "a significant potential of prejudice" as to mandate separate voir dire of the jurors. We find no abuse of

the trial judge's discretion in these instances.

4. Duress Defense

Appellants contend that the trial court erred in refusing to instruct the jury on the defense of duress. Appellants reason that they were coerced by the police into offering bribesand that such economic coercion--sufficient to establish a case under the Hobbs Act, 18 U.S.C. §1951--is a complete defense to the bribery charge.

This argument is unconvincing for three reasons. First, the Supreme Court held in United States v. Bailey, 444 U.S. 394 (1980), that the duress defense is not available "if there was a reasonable, legal alternative to violating the law, 'a chance both to refuse to do the criminal act and also to avoid the threatened harm.'" Id. at 410 [citing W.

LaFave & A. Scott, Handbook on Criminal Law 379 (1972)]. In the present case there were legal alternatives available: the matter could have been reported to the Internal Affairs Division of the New Orleans Police Department,5/ to the district attorney, or to the United States attorney. Since appellants failed to pursue available reasonable alternatives, they may not successfully raise the duress defense.6/

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5. Colacurcio contends that this approach would not be fruitful since on two prior occasions he filed such a complaint, received no satisfaction, and was sued by one of the policemen. But notwithstanding this previous experience, Colacurcio's lawyer recommended that he report his allegations of police harassment to the Internal Affairs Division rather than violate the law. Under these circumstances we are not convinced that this alternative was foreclosed.

6. Having thus decided this issue, we do not reach the question of whether the required coercion must be physical. We note that the Supreme Court has intimated, in regard to duress as a de-

Further, appellants' insistence that extortion can be a defense to bribery is incorrect. See United States v. McPartlin, 595 F.2d 1321 (7 Cir.), cert. denied, 444 U.S. 833 (1979). Therefore, even if the appellants were subjected to extortion, they can still be convicted on the bribery charge.

Finally, the record clearly demonstrates that the payoffs were not keyed to the termination of the alleged police harassment, but were solely to protect the gambling operation. The suggestion that appellants should not be convicted of bribery because they were forced by the police to make the payments in order to continue their illegal gambling business is devoid of merit. We find no error in the trial

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fense to a prosecution for prison escape, that physical coercion may be required. United States v. Bailey, 444 U.S. 394 (1980).

judge's refusal to instruct the jury on duress.

The convictions of all appellants are AFFIRMED.

APPENDIX "B"

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 80-3063

D. C. Docket No. CR-79-260-"F"

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

WILLIAM COLACURCIO, JR., a/k/a Rick Colacurcio, DINOS RALLIS, a/k/a Kanavaros Panayotis, and THEODOROS G. DIMOPOULAS, a/k/a Teddy,

Defendants-Appellants.

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Appeal from the United States District Court for the Eastern District of Louisiana

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Before THORNBERRY, REAVLEY and POLITZ, Circuit Judges

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the convictions of the said District Court in this cause be, and the same is hereby, affirmed;

OCTOBER 22, 1981.

Issued as Mandate: December 14, 1981

APPENDIX "C"

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNIT A & B

No. 80-3063

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

WILLIAM COLACURCIO, JR., a/k/a Rick Colacurcio, DINOS RALLIS, a/k/a Kanavaros Panayotis, and THEODOROS G. DIMOPOULAS, a/k/a Teddy,

Defendants-Appellants.

Appeals from the United States District Court for the Eastern District of Louisiana

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ON PETITIONS FOR REHEARING
(December 3, 1981)

Before THORNBERRY, REAVLEY and POLITZ, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed on behalf of Wm. Colacurcio, Jr., Theodoros DiMopoulas and Dinos Rallis, in the above entitled and numbered cause be and the same are hereby DENIED.

ENTERED FOR THE COURT:

s/ Henry A. Politz
United States Circuit Judge

APPENDIX "D"

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 80-3063

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

WILLIAM COLACURCIO, JR., a/k/a Rick Colacurcio, DINOS RALLIS, a/k/a Kanavaros Panayotis, and THEODOROS G. DiMOPOULAS, a/k/a Teddy,

Defendants-Appellants.

Appeals from the United States District Court for the Eastern District of Louisiana

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O R D E R:

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(X) The motion of appellant, William Colacurcio, Jr., for stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including February 1, 1982, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

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s/ Henry A. Politz

UNITED STATES CIRCUIT JUDGE